82-1683

Office-Supreme Court, U.S.
FILED
APR 6 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEST TEXAS STATE UNIVERSITY, *et al.*,
Petitioners,

v.

TINA BENNETT, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALAN B. JONES
Counsel of Record

HARLOW SPROUSE
UNDERWOOD, WILSON, BERRY,
STEIN & JOHNSON
P. O. Box 9158
Amarillo, Texas 79105
(806) 376-5613

Attorneys for Petitioners

QUESTION PRESENTED

Does Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, 20 U.S.C. § 1681, *et seq.*, apply to the intercollegiate athletics program of a university as a result of the receipt of Federal financial assistance by the university's students or by other education programs or activities conducted by the university, when the intercollegiate athletics program itself receives no direct Federal financial assistance?

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court of appeals are as follows:

Tina Bennett, Geneva McAfee, Deanne Robertson, Yvonne Berryhill, Arlene Bern and Diana Byrnes ..... Plaintiffs/Appellants/Respondents

West Texas State University, Dr. Myron H. Dees, Dr. Gail Shannon, Max R. Sherman, T. L. Roach, Jr., Charles Schmidt, Dee S. Osborne and Don Davis ..... Defendants/Appellees/Petitioners

Some of the individual Petitioners named above were not joined as defendants in the district court, but have subsequently become parties to this proceeding by operation of law. FED. R. CIV. P. 25(d), FED. R. APP. P. 43(c).

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Allowing the Writ	6
I. By reversing the district court's summary judgment, the court of appeals decided an important question of Federal law which has not been, but should be, settled by this Court	6
II. By reversing the district court's summary judgment, the court of appeals decided this case in a manner which conflicts with the decisions of other courts of appeals on the same matter	17
Conclusion	18
Certificate of Service	19
Appendix A — Opinion of the Court of Appeals	
Appendix B — Opinion of the District Court	
Appendix C — Judgment of the Court of Appeals	
Appendix D — Order of the Court of Appeals on Petition for Rehearing	
Appendix E — Text of Title IX	

TABLE OF AUTHORITIES

Cases

Page

Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (Feb. 22, 1983) 2, 10, 12, 13, 16

Haffer v. Temple University, 688 F.2d 14 (3rd Cir. 1982) 13, 16

Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982) 10, 11, 17

North Haven Board of Education v. Bell, U.S. , 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) 5, 6, 7, 9, 10, 11, 16, 18

Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D. Mich. 1981) *aff'd on other grounds*, F.2d (6th Cir., No. 81-1259, Feb. 2, 1983) 17

Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981) 12, 17

Stewart v. New York University, 430 F. Supp. 1305 (S.D.N.Y. 1976) 17

University of Richmond v. Bell, 543 F. Supp. 321 (E.D.Va. 1982 ..... 13, 14, 15, 16, 17

Statutes

Title IX, Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, 20 U.S.C. § 1681, *et seq.* ..... passim

Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 678, 20 U.S.C. § 3441(a)(3) 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

	Page
28 U.S.C. § 2201	3
28 U.S.C. § 2202	3
FED. R. CIV. P. 25(d)	i
FED. R. APP. P. 43(c)	i
TEX. EDUC. CODE ANN., § 54.503	3

Regulations

45 C.F.R. § 86.1, *et seq.*, recodified at 34 C.F.R. § 106.1, *et seq.*	3

Miscellaneous

Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to Clarence M. Pendleton, Jr., Chairman, United States Commission on Civil Rights (September 16, 1982)	15
The Washington Post, September 9, 1982 (Final Edition)	16
The Washington Post, October 11, 1982 (Final Edition)	15

In The

Supreme Court of the United States

October Term, 1982

No.

West Texas State University, *et al.*,
Petitioners,

v.

Tina Bennett, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals was not published. That opinion is reproduced as Appendix A. The opinion of the district court is reported at 525 F. Supp. 77 and is reproduced as Appendix B.

JURISDICTION

The judgment of the court of appeals was rendered on January 31, 1983. Petitioners' timely petition for rehearing before the court of appeals was granted in part and denied in part by order of February 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, 20 U.S.C. § 1681, *et seq.*, and, in particular, Section 901(a) of Title IX, 20 U.S.C. § 1681(a). Section 901(a) provides, in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

The statute is reproduced in its entirety as Appendix E.

STATEMENT OF THE CASE

This case presents issues which are very similar to those presented to the Court in *Grove City College v. Bell*, 687 F.2d 684 (3rd Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (Feb. 22, 1983). Both cases involve the construction of § 901(a) of the Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373, 20 U.S.C. § 1681(a) (hereinafter called "Title IX"). Specifically, both cases involve the question of whether Federal financial aid to students constitutes "Federal financial assistance" to an education program or activity at the students' school.[1] However, where *Grove City* deals with the applicability of Title IX to an entire institution, this case concerns its applicability to only one program — intercollegiate athletics.

---

[1]This case also involves Federal aid for construction purposes, an issue not presented in *Grove City*.

This suit was brought by six female students at West Texas State University ("WTSU" or "the university") who participate in various aspects of the university's intercollegiate athletics program. The students sued on behalf of themselves and as representatives of a class of present and future female intercollegiate athletes at WTSU. The defendants were the university itself, and several of its officials.[2] Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

The plaintiff students alleged that the university had violated Title IX and the regulations of the Department of Health, Education and Welfare, 45 C.F.R. § 86.1, *et seq.*,[3] by engaging in a panoply of "policies and practices" which discriminate against women on the basis of sex and deny women equal opportunity in the university's intercollegiate athletics program. The university denied the plaintiffs' charges of discrimination.

Title IX does not prohibit sex discrimination in education generally. Rather, Title IX only prohibits discrimination on the basis of gender in "any education program or activity receiving Federal financial assistance." The connection between intercollegiate athletics at WTSU and the Federal fisc was thus a crucial threshold question in this case.

Intercollegiate athletics at WTSU draws its funding from three sources: ticket sales and guarantees, private donations, and the student service fee authorized by Tex.

---

[2]For the sake of simplicity, references to "WTSU" or "the university" in connection with the course of these proceedings include the individual defendants as well as the institution.

[3]Recodified at 34 C.F.R. § 106.1 1, *et seq.*, upon the transfer of HEW's functions under Title IX to the Department of Education. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 678, 20 U.S.C. § 3441(a)(3).

EDUC. CODE ANN., § 54.503. The university's intercollegiate athletics program receives none of its funding from the Federal government or from any agency or department thereof. Based on this lack of financial connection between intercollegiate athletics and Federal dollars, the university filed a motion for summary judgment. It urged that, since intercollegiate athletics at WTSU enjoyed no financial assistance from the Federal government, it was not subject to Federal regulation under Title IX.

In response to the university's motion, the plaintiff students conducted considerable discovery with respect to this issue. They deposed both the university's Business Manager and Chief Fiscal Officer and its Athletic Director, and sought further information by way of written interrogatories. The plaintiffs' discovery disclosed no direct Federal financial assistance to intercollegiate athletics at WTSU. However, like most colleges and universities in this day, WTSU has not been able to avoid at least a minimal degree of contact with the Federal government. For instance, some of the university's students receive Federal aid of one form or another: Basic Educational Opportunity Grants ("BEOGs"), Supplemental Educational Opportunity Grants ("SEOGs"), National Direct Student Loans ("NDSLs"), Guaranteed Student Loans ("GSLs"), college work-study benefits, veteran's benefits, etc. Furthermore, during the past decade, WTSU has accepted Federal assistance in the construction or expansion of five buildings on campus: a men's dormitory, a women's dormitory, an addition to the dining hall, a science building and a library. Finally, the university continues to offer an ROTC program, resulting in the presence of the United States Army on campus.

In response to the university's motion for summary judgment, the plaintiffs pointed only to these areas of Federal financial involvement at WTSU. The plaintiffs

directed the attention of the district court to no Federal funding going directly to intercollegiate athletics. Instead, the plaintiffs argued that Federal aid to students, Federal aid in the construction of non-athletic facilities, and the fact that an ROTC instructor volunteered to coach the co-ed riflery team were sufficient to subject intercollegiate athletics at WTSU to Title IX coverage.

The district court disagreed. That court, anticipating this Court's holding in *North Haven Board of Education v. Bell,* U.S. , 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), determined that Title IX is "programmatic" in scope and that, before the statute will apply to a particular education program or activity, Federal financial assistance to that specific program or activity is required. The district court further held that the challenged program must directly receive the financial assistance which is claimed to be the nexus with the Federal government; it is not sufficient if the challenged program merely derives some indirect benefit from Federal assistance to another program, or to the institution as a whole or to its students. Finding no such assistance to intercollegiate athletics at WTSU, the district court rendered summary judgment for the university.

The court of appeals reversed the district court's summary judgment and remanded the case for further proceedings. In doing so, the court of appeals pointed to neither a genuine issue as to a material fact in the record nor an erroneous legal conclusion drawn by the district court which rendered summary judgment inappropriate. Rather, the court of appeals concluded only that the plaintiffs had not been "allowed to make a record of the direct funding that comes to the athletics department from the sources they identified," and reversed on that basis alone.

The court of appeals also stated that the plaintiffs "should be permitted to demonstrate the sex discrimination which allegedly exists in the intercollegiate athletics program," thereby intimating that the district court was not permitted on remand to consider the Federal funding issue apart from the merits of the case and dispose of the litigation on that basis, if appropriate. In response to the university's petition for rehearing, the court of appeals eliminated the latter sentence from its opinion. Otherwise, the petition for rehearing was denied.

REASONS FOR ALLOWING THE WRIT

I.

By reversing the district court's summary judgment, the court of appeals decided an important question of Federal law which has not been, but should be, settled by this Court.

In *North Haven Board of Education v. Bell, supra,* this Court determined that Title IX has a "program-specific focus," rejecting the "institutional" construction of Title IX which has consistently been advocated by the plaintiffs in this case. This Court determined that the focus of inquiry in a Title IX case is whether discrimination is alleged to have occurred in a "program," as opposed to an "institution," which receives Federal financial assistance. This Court thus adopted the same general view of Title IX's scope as that which the district court had settled upon in granting summary judgment in this case. However, in *North Haven* this Court expressly declined to define the term "program," leaving that issue for another day. Also left for another day was the issue of the type of Federal expenditure which will constitute Federal financial assistance to a particular program, a question not presented in *North Haven*. Both questions are presented here.

The plaintiffs have urged, in effect, that in the case of a university which offers a variety of educational, extracurricular and related programs and activities, the institution itself must be considered a "program" for Title IX purposes. According to the plaintiffs, if the university receives funding in any measure from the Federal government, whether that funding is general or is for the purpose of conducting specific and discrete programs and activities, then all of its programs and activities benefit in some manner, albeit indirectly, from the expenditure of Federal funds. In such a circumstance, the plaintiffs would deem the entire institution a "program," rendering the institution itself and all of its distinct programs and activities subject to the strictures of Title IX. By artful definition of the term "program," the plaintiffs thus reach the same result as would have been reached had this Court accorded Title IX an "institutional" construction in *North Haven*.

Others, including the university, accord the term "program" a narrower meaning. The language contained in both § 901(a) and other portions of Title IX and the legislative history of the statute indicate that distinct programs or activities of a multi-program entity such as a university must be viewed separately. The key inquiry is whether the specific program or activity in which gender discrimination is claimed itself receives Federal aid. Stated another way, the threshold question under Title IX is whether the discrimination alleged by the plaintiff is discrimination in a Federally funded education program. Any other conclusion would circumvent the "programmatic" construction of the statute settled upon in *North Haven*.

Similar disagreement exists with respect to the meaning of the terms "receiving" and "assistance," as they are used in Title IX. According to the plaintiffs, even if the focus of inquiry is upon discrete programs or activities of a

university, those individual programs "receive" Federal financial assistance if it can be argued that they derive a benefit from the expenditure of Federal money. Thus, according to the plaintiffs Federal financial assistance to one program of a multi-program entity constitutes assistance to all programs since the Federal funds "free" funds of the institution for use in other programs. Similarly, according to the plaintiffs the receipt of Federal aid by students constitutes Federal financial assistance to the university, and in turn to all of its programs and activities, because student financial aid is ultimately used by the students for the payment of tuition, room, board, fees, and other expenses to the university. The plaintiffs would accord to the term "assistance" no connotation of patronage, aid or help, but would include within that term money which is paid to a university in exchange for education-related goods and services. Thus, under the plaintiffs' theory, if a dollar can be traced from the Federal government to a university, the university and all of its programs and activities are thereby rendered subject to Title IX regardless of the manner in which, and reason for which, the dollar was paid and regardless of the identity of the payor.

The university, on the other hand, takes the position that the financial assistance which is claimed to be the nexus between the Federal government and a challenged program must be received directly by the program. The university rejects the notion that an education program which itself receives no direct funding by the Federal government can be subjected to Title IX by assertions that it benefits, in some speculative and unquantifiable manner, from Federal assistance to another program. The university likewise rejects the notion that its students' use of their Federal aid to purchase goods and services for their education constitutes Federal financial assistance to the university and all

of its programs. In other words, the university rejects the plaintiffs' attempt to define the terms "receiving" and "assistance" in such a manner as to circumvent the programmatic construction of Title IX adopted in *North Haven*.

These questions are of controlling importance in this case. The challenged program here is intercollegiate athletics. However, the plaintiffs have never pointed to any Federal financial assistance to intercollegiate athletics at WTSU, as there is none. The financial assistance relied upon by the plaintiffs to supply the link with the Federal government is of essentially two types: Federal aid for the purpose of constructing non-athletic facilities and Federal aid to students.[4] However, the plaintiffs claim discrimination in neither the operation of the Federally funded facilities nor the university's role in administering student financial aid. The meaning given to the terms "program," "receiving" and "assistance" will therefore determine whether the Federal money relied upon by the plaintiffs can result in Title IX coverage of a program so apparently unrelated to that money as intercollegiate athletics. The court of appeals evidently concluded that, at least under some circumstances, it can since it reversed the district court's judgment that it cannot. That conclusion involves significant questions of Federal law which should be decided by this Court.

Several courts have confronted the issues presented in this case. However, neither the focus of those courts nor their holdings on the issues presented here has been unanimous. The significance of Federal aid to students has recently been considered by two courts of appeal

---

[4]The court of appeals evidently found little significance in the ROTC instructor's gratuitous undertaking to coach the riflery team.

which have reached directly contradictory conclusions. In *Grove City College v. Bell, supra,* the Third Circuit held that Federal aid to students constitutes Federal financial assistance to the college for Title IX purposes. The court rejected Grove City's argument that only direct assistance to a program would render it subject to the statute. In holding that aid to students constitutes "Federal financial assistance" to the college, the court stated:

> In light of Congress' intent which we have gleaned from the legislative history of Title IX, we are satisfied that monies which are paid to students, who in turn use those funds for their education, constitute no less a part of the college's revenues than federal monies paid directly to the institution itself.

Id., at 693. In response to Grove City's argument that student aid is general and non-program specific and that such a construction of the statute would circumvent this Court's decision in *North Haven,* the Third Circuit opined that the institution was the "program" for Title IX purposes. According to the court:

> Because the federal grants made to Grove's students necessarily inure to the benefit of the entire College, the "program" here must be defined as the entire institution of Grove City College.

Id., at 700 [footnote omitted]. This Court has granted certiorari to review these holdings.

In *Hillsdale College v. Department of Health, Education and Welfare,* 696 F.2d 418 (6th Cir. 1982), the Sixth Circuit reached the opposite result. In *Hillsdale,* the court was faced with some of the same financial aid programs which are at issue in this case — the "NDSL" program, the "BEOG" program, the "SEOG" program, and the "GSL" program. HEW insisted that the college's students' receipt

of Federal aid rendered Hillsdale an "education program" within the meaning of Title IX, obligating it to execute the agency's "Assurance of Compliance" form.

The court in *Hillsdale* used this Court's decision in *North Haven* as its point of departure. The court noted HEW's position that, when an educational institution receives Federal money as a result of its students' receipt of Federal grants and loans, the entire institution constitutes an education program or activity. However, relying in part upon the district court's opinion in this case, the *Hillsdale* court found inconsistency between that position and the programmatic nature of Title IX:

> Under the position taken by the plaintiffs in *Bennett* and HEW in the instant case, every program or activity of an educational institution that accepts students who receive federal financial assistance would be subjected to regulation under Title IX. If discrimination is found in a particular program or activity of the institution, such as the athletic program or the math department, the remedy, as sought in this instance by HEW, would be to terminate *all* student federal financial assistance. For the reasons stated herein, we find HEW's position to be inconsistent with the program-specific language of Sections 901 and 902 of Title IX.

Id., at 428. According to the court, the "practical effect" of HEW's position "would be to circumvent the programmatic focus of the statute and adopt the institutional approach" which this Court had refused to adopt in *North Haven*. *Id.*, at 427. The Sixth Circuit therefore rejected HEW's contention that the entire college was a "program" within the meaning of Title IX and held that "only the student loan and grant program is subject to Title IX regulation." *Id.*, at 430. The *Hillsdale* court also expressly declined to follow

the decision of the Third Circuit in *Grove City College v. Bell, supra.*

These directly contradictory decisions by the Third and Sixth Circuits are not the only ones which have considered the relationship between Title IX and student financial aid. In *Rice v. President and Fellows of Harvard College,* 663 F.2d 336 (1st Cir. 1981), the plaintiff alleged discrimination in the awarding of grades at Harvard Law School in violation of Title IX. The plaintiff asserted that:

> . . . by virtue of the Law School's status as a recipient of federal funds through such specific programs as work-study, Title IX applies whenever the School discriminates in *any* area, regardless of whether the discrimination occurs in a program that is federally funded.

Id., at 338. In *Rice,* the First Circuit joined the ranks of those courts which have concluded that Title IX is a program-specific statute. The court noted that the only Federally funded program identified by the plaintiff was the work-study program. In affirming the district court's dismissal of the case, the court stated:

> By alleging merely that Harvard Law School receives federal funds for its work-study program, without alleging sex discrimination in the School's handling of that program, Rice has failed to bring herself within the protection of Title IX.

Id., at 339 [footnote omitted]. In a footnote, the court amplified its holding by stating that:

> . . . once admitted to an educational institution, allegations of discrimination in violation of 20 U.S.C. § 1681

> must involve discrimination by the particular funded education program within that institution.

Id., at 339, n. 2.

On the other hand, a second panel of the Third Circuit followed *Grove City* in holding that indirect benefits to an education program, including whatever benefit that program might reap as a result of Federal financial aid to students, were sufficient to trigger Title IX coverage of the program. *Haffer v. Temple University*, 688 F.2d 14 (3rd Cir. 1982). Noting the binding effect of opinions of prior panels in that court, the *Haffer* court stated:

> Whatever the views of the individual judges on this panel may be, the result reached in *Grove City* and the reasoning employed by the Court there resolve the present appeal.
>
> • • •
>
> After *Grove City*, then, it is clear that the only result we can reach in this appeal is to affirm: if Temple University as a whole is to be considered the "program or activity" for Title IX purposes, it follows that because the University as a whole receives federal monies, its intercollegiate athletic department is governed by Title IX.

Id., at 16-17 [footnotes omitted].

In addition to the four decisions of courts of appeals discussed above, a decision of one Federal district court in this area merits comment. In *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D.Va. 1982), the court was faced with the precise issue presented here, *i.e.*, whether an intercollegiate athletics program was rendered subject to Title IX by virtue of Federal aid to students and Federal aid for

the purpose of constructing non-athletic facilities. As is the case here, the athletic department at Richmond is "funded separately from other programs at the University based on a budget drawn from sports revenues and gifts and the general funds of the University. It receives no direct federal financial assistance." *Id.*, at 323.

In *Richmond*, the court declined to treat Federal aid to students as Federal financial assistance to the university. According to the court:

> These funds received by UR from or on behalf of students, and which originate from federal funds are not really " 'federal assistance' [at all] but rather payments for services rendered. Federal judges receive federal salary checks each month but it is not supposed that this is 'assistance'. It is presumed that they are being paid an approximation, at least, of what they should be compensated for judging." *Trageser v. Libbie Rehabilitation Center, Inc.*, 462 F. Supp. 424, 426 (E.D. Va. 1977), *aff'd*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1979).

Id., at 330. The court also held that Title IX coverage of a program is conditioned upon direct assistance to that program. Accordingly, the court held that some indirect benefit that the intercollegiate athletics program might derive by virtue of Federal financial assistance to other programs (such as the university's non-athletic construction program) is not a sufficient basis upon which to predicate Title IX coverage of intercollegiate athletics. In conclusion, the court stated:

> The Court simply will not countenance the ED's attempt to bootstrap itself through its regulations to

> make, by necessary implication, all programs and activities of a private university subject to its control when any program or activity within the institution, or the institution, or students themselves receive what it determines to be "federal financial assistance." *See* 34 C.F.R. § 106.2(g).

Id., at 330-331. Accordingly, the court enjoined the Department of Education from investigating any program or activity at an educational institution within its jurisdiction without a showing that the program or activity is the recipient of direct Federal financial assistance.

Apart from its holding, the primary importance of the *Richmond* decision lies in the response of the Departments of Justice and Education to that decision. Those agencies determined not to appeal the *Richmond* decision. In a letter to the Chairman of the United States Commission on Civil Rights,[5] the Assistant Attorney General for Civil Rights stated the government's position that:

> In light of the clear language of Sections 901 and 902, the accompanying legislative history, and the Supreme Court's recent pronouncement of the intended scope of Title IX coverage, we found Judge Warriner's opinion to be both analytically and legally sound. Its conclusion that only those University programs and activities shown to be recipients of Federal funds are within the reach of Title IX is fully consistent with the better reasoned judicial precedents in the area. *See Rice* v. *President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981); *Bennett* v. *West Texas State Uni-*

[5]Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, United States Department of Justice, to Clarence M. Pendleton, Jr., Chairman, United States Commission on Civil Rights (September 16, 1982), discussed in The Washington Post, October 11, 1982 (Final Edition), at A 17.

versity, No. 280-0073-f (N.D. Tex., July 27, 1981); *Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981).

The Assistant Attorney General expressly referred to the decisions of the Third Circuit in *Grove City* and *Haffer*, *supra*, and concluded that Judge Warriner's opinion in *Richmond* "had the best of it."[6] Thus, the two agencies of the Federal government most intensely involved in the enforcement of Title IX have apparently concluded that the opinion of the district court in this case, which the court of appeals reversed, correctly construed the nature and scope of Title IX, at least in the area of intercollegiate athletics.

Confusion and inconsistent precedent thus mark our progress to date in the effort to define the terms "program," "receiving" and "assistance" as used in Title IX. This Court's decision in *North Haven*, while it directs us toward the proper path to follow, gives us little light to guide our way. The court of appeals in this case presumably concluded that those terms are broad enough to encompass whatever indirect benefit an education program may derive by virtue of Federal aid to students or to other unrelated programs. However, the complexity of these issues, the inconsistent results achieved in dealing with them and their far-reaching effects on American education dictate that they should be resolved by this Court. This Court has agreed to consider the issues presented by *Grove City*. Certiorari should be granted to review the related issues presented here as well.

---

[6]*See also* The Washington Post, September 9, 1982 (Final Edition), at A23, where Assistant Attorney General Reynolds is quoted as stating that the *Richmond* decision "is pretty sound as a matter of law."

II.

By reversing the district court's summary judgment, the court of appeals decided this case in a manner which conflicts with the decisions of other courts of appeals on the same matter.

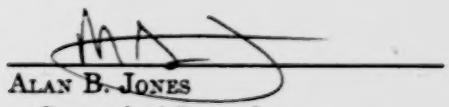
While the opinion of the court of appeals is by no means unambiguous, it must be inferred that the court concluded that, at least under some circumstances, student financial aid could constitute Federal financial assistance to a university and its intercollegiate athletics program for purposes of Title IX. This holding directly conflicts with the decisions of the courts of appeal for the First and Sixth Circuits in *Rice* and *Hillsdale College, supra.*

Moreover, the decision of the court of appeals conflicts with the decisions of a number of district courts, with respect to both the effect of student financial aid and the effect of Federal aid for the purpose of facility construction and other non-athletic purposes. *University of Richmond v. Bell, supra; Othen v. Ann Arbor School Board,* 507 F. Supp. 1376 (E.D.Mich. 1981), *aff'd on other grounds,* F.2d (6th Cir., No. 81-1259, Feb. 2, 1983); *Stewart v. New York University,* 430 F. Supp. 1305 (S.D.N.Y. 1976). The significance of these district court decisions, and of the conflict which exists between them and the court of appeals below, lies in the fact that the Departments of Education and Justice have evidently adopted the construction of Title IX set forth in those cases, and presumably will conform their conduct regarding enforcement of Title IX to those decisions. The decision of the court of appeals thus conflicts with the construction of Title IX adopted by the agencies of the United States government charged with the enforcement of that statute. Certiorari should be granted in order to resolve these conflicts.

CONCLUSION

This Court's decision in *North Haven* leaves significant questions unanswered. The resolution of those questions will determine the degree to which the Federal government may exercise control over education programs at most colleges and universities in the nation. Those questions embrace significant issues of Federal law upon which there is no unanimity of decision among the lower courts. A writ of certiorari should be granted in this case in order to settle these issues, and in order to resolve the conflict between the decision of the court of appeals below and the decisions of other courts which have considered these issues.

Respectfully submitted,



ALAN B. JONES
Counsel of Record

HARLOW SPROUSE
UNDERWOOD, WILSON, BERRY,
STEIN & JOHNSON
P. O. Box 9158
Amarillo, Texas 79105
(806) 376-5613

Attorneys for Petitioners

CERTIFICATE OF SERVICE

This is to certify that, on the 5 day of April, 1983, three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Respondents by placing the same in the United States mails, certified mail, postage prepaid, addressed to their attorneys of record as follows:

Ms. Margaret Kohn
Ms. Marcia D. Greenberger
Ms. Nancy Duff Campbell
National Women's Law Center
1751 N Street, N.W.
Washington, D.C. 20036

Ms. Betty Wheeler
Hoffman & Wheeler
1008 S. Madison
Amarillo, TX 79101

ALAN B. JONES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 81-1398

DO NOT PUBLISH

TINA BENNETT, et al.,

Plaintiffs-Appellants

versus

WEST TEXAS STATE UNIVERSITY, et al.,

Defendants-Appellees

Appeal from the United States District Court
For the Northern District of Texas

(January 31, 1983)

Before GARZA, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

This appeal challenges a summary judgment of dismissal in a class action charging sex discrimination in the intercollegiate athletics program at West Texas State University. Plaintiffs alleged in their complaint that Title IX of the Education Amendments

APPENDIX A

of 1972, 20 U.S.C. § 1681 et seq.,[1] was violated by the various policies and practices which discriminate against women by denying them equal opportunity in the university intercollegiate athletics program.

---

[1] Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681. After this general prohibition come nine exceptions to coverage, none of which are relevant to the instant case.

It is undisputed that West Texas State University receives a great deal of federal money. The dispute in this case centers around the exact type of federal financial assistance which triggers the provisions of Title IX. There are two theories on this issue, as the district court recognized in its opinion.

> The Defendants have argued that the exact language of Title IX itself is controlling and, thus, that only if an athletic program or activity directly receives federal financial assistance must there be no discrimination. This is what has been referred to as the "programmatic approach." Plaintiffs assert, to the contrary, that what is prohibited is "institutional" discrimination, i.e., that if an institution receives federal funds, then there may not be any discrimination in any of its programs or activities, regardless of whether that program or activity itself receives the federal aid. This is the approach taken by the regulations.

Record on Appeal, vol. 2, at 343-44.

APPENDIX A

The court below ruled adversely to plaintiffs, holding first that the institutional approach was invalid and second, that the plaintiffs had not demonstrated receipt of the "direct" funds necessary to trigger Title IX under the programmatic approach. Without anticipating the decision of the Fifth Circuit on these issues, we simply hold today that the plaintiffs must be permitted to present a case on the receipt of direct funds by the athletics department. Plaintiffs contend that the athletics program does indeed receive direct funds including work-study employment assistance to students who are employed in the athletics department, compulsory student fees which support the athletics program and subsidized housing for athletes. At this point in the development of the case, plaintiffs have not been allowed to make a record of the direct funding that comes to the athletics department from the sources they identified. They must be permitted to do so. In addition, they should be permitted to demonstrate the sex discrimination which allegedly exists in the intercollegiate athletics program.

For the foregoing reasons, we reverse and remand for further consideration consistent with this opinion.

REVERSED AND REMANDED.

A true copy
Test: GILBERT F. CASTAGNEAU
Clerk, U S Court of Appeals, Fifth Circuit
By
New Orleans, La.
MAR 28 1989

channel when part of the reservation was allotted in 1886 was added to the riverbed by a series of accretive changes between 1886 and the late 1940's and therefore was added to the Tribe's ownership of the bed. *Ghione v. Washington, supra.*

[22] 23. Movement of the river channel by the Army Corps of Engineers, described in finding 17 above, constitutes an avulsive change under Washington law. *Harper v. Holston, supra; Ghione v. Washington, supra; Rose v. Riedinger,* 13 Wash.App. 222, 534 P.2d 146 (Wn.Ct.App.1975); *Parker v. Farrell,* 74 Wash.2d 553, 445 P.2d 620 (1968).

[23] 24. Under Washington law, when the bank of a river forms the boundary between two property owners, an avulsive change in the river channel does not affect the boundary. *Harper v. Holston, supra; Parker v. Farrell, supra.*

[24] 25. When artificial relocation of a river channel leaves portions of the former channel abandoned as dry land, the owner of the river bed retains ownership of the abandoned channel under Washington law. The owner of property adjacent to the abandoned channel does not receive title. *Hill v. Newell,* 86 Wash. 227, 149 P. 951 (1915); *Commercial Waterway District v. Washington,* 50 Wash.2d 335, 311 P.2d 680 (1957); *Ghione v. Washington, supra.*

[25] 26. The United States did convey the beneficial ownership of the Puyallup riverbed, within the boundaries of the Puyallup Reservation, to the Puyallup Indians by the Treaties of 1854–1855 and the Executive Order of January 27, 1857.

27. The United States continues to hold the property at issue herein in trust for the use and benefit of the Puyallup Tribe.

28. Title to the bed of the Puyallup river, within the exterior boundaries of the Puyallup Reservation, did not pass to the State of Washington when it became a State of the Union in 1889.

29. Plaintiffs petition for Declaratory Judgment Quieting Title to the bed of the Puyallup River as to those parcels of real property herein described, is GRANTED.

Tina BENNETT, et al.

v.

WEST TEXAS STATE UNIVERSITY, et al.

Civ. A. No. CA2-80-0073-F.

United States District Court, N. D. Texas, Amarillo Division.

July 27, 1981.

Plaintiffs, female students at state university who participated in university's intercollegiate athletics program brought suit against university and various individuals responsible for administration of university's intercollegiate athletics program and other university affairs, contending that certain policies and practices violated Title IX of the Education Amendments of 1972 and regulations promulgated thereunder. The District Court, Robert W. Porter, J., held that: (1) Title IX governs program if that specific program receives federal financial assistance, and to the extent that federal regulations attempted to apply strictures of Title IX on institutional basis, regulations were invalid, and (2) type of indirect aid received by university athletic program did not bring them within ambit of Title IX.

Summary judgment for defendants.

1. Civil Rights ⇐9.5

Title IX of the Education Amendments of 1972 and regulations promulgated thereunder apply only to specific programs or activities which receive direct federal financial assistance; to the extent that regulations attempt to apply strictures of Title IX on an institutional basis, regulations are invalid. Education Amendments of 1972, §§ 901 et seq., 902, 904, 20 U.S.C.A. §§ 1681 et seq., 1682, 1684.

2. Civil Rights ⇐9.5

Type of indirect aid received by state university athletic program did not bring them within ambit of Title IX of the Education Amendments, despite contention that athletic programs received funds that would otherwise have been diverted without the infusion of federal monies. Education Amendments of 1972, §§ 901 et seq., 902, 904, 20 U.S.C.A. §§ 1681 et seq., 1682, 1684.

Betty Wheeler, Hoffman, Steeg & Wheeler, Amarillo, Tex., for plaintiffs.

Alan B. Jones and Harlow Sprouse, Underwood, Wilson, Berry, Stein & Johnson, Amarillo, Tex., Edna I. Ramon, Asst. Atty. Gen., Austin, Tex., for defendants.

MEMORANDUM ORDER GRANTING SUMMARY JUDGMENT

ROBERT W. PORTER, District Judge.

The named Plaintiffs in this action are six female students at West Texas State University in Canyon, Texas, who participate in the University's intercollegiate athletics program. The Defendants are the University as well as various individuals who are responsible for the administration of the University's affairs, including but not limited to the intercollegiate athletics program.

The Plaintiffs, on behalf of themselves and as representatives of the class that has heretofore been certified, have alleged that the Defendants maintain various policies and practices which discriminate against women on the basis of sex and which deny women equal opportunity in the University's intercollegiate athletics program. The Plaintiffs contend that such policies and practices have had the effect of excluding Plaintiffs from full participation in, denying Plaintiffs the benefits of, and subjecting Plaintiffs to discrimination in an athletic program or activity receiving federal financial assistance, and thus that such policies and practices are in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (hereinafter Title IX) and the regulations promulgated thereunder, 34 C.F.R. § 106.1 *et seq.* (originally codified at 45 C.F.R. § 86.1 *et seq.*).

It is the Defendants' position that the intercollegiate athletics program does not receive federal financial assistance, and therefore that the program is outside the scope of Title IX. The Defendants also contend that, to the extent the referenced regulations purport to apply to the University's intercollegiate athletic program irrespective of the absence of direct federal financial assistance to that specific program, those regulations are beyond the statutory authority granted under Title IX and are invalid.

The Defendants have filed a motion for summary judgment, to which the Plaintiffs have duly responded. After hearing and careful consideration of the briefs and arguments of counsel, I am of the opinion, for the reasons set out below, that the Defendants are entitled to summary judgment as a matter of law.

I.

The portion of Title IX at issue here is Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681, which provides in pertinent part, that

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . .

The regulations, 34 C.F.R. § 106.1, which have been promulgated by the Department of Education pursuant to Title IX, provide as follows:

> (a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any intercollegiate, club, or intramural athletics offered by a *recipient*, and no recipient shall provide any such athletics separately on such basis. (emphasis added).

The resolution of Defendants' motion for summary judgment is dependent upon the meaning and effect of these two provisions and their relationship to one another. The Defendants have argued that the exact language of Title IX itself is controlling and, thus, that only if an athletic program or activity directly receives federal financial assistance must there be no discrimination. This is what has been referred to as the "programmatic approach." Plaintiffs assert, to the contrary, that what is prohibited is "institutional" discrimination, i. e., that if an institution receives federal funds, then there may not be any discrimination in any of its programs or activities, regardless of whether that program or activity itself receives the federal aid. This is the approach taken by the regulations.

II.

An examination of the various sections of Title IX indicates that the drafters of this legislation were very aware of the distinction between the programmatic and institutional approaches. For example, 20 U.S.C. § 1682, the provision by which the agency and the courts are to determine the permissible scope of any regulations instituted to effectuate Title IX, limits the agency's authority to promulgate rules and regulations to include only those programs or activities receiving federal financial assistance:

> Each federal department ... which is empowered to extend Federal financial assistance to any education program or activity ... is authorized and directed to effectuate the provisions of section 1681 of this title *with respect to such program or activity* by issuing rules, regulations, or orders. (emphasis added).

[1] Section 1682 also contains an enforcement provision which provides for termination of federal financial assistance, which is limited to particular programs or activities which receive federal funds. These provisions obviously embody a programmatic approach and should be contrasted with the institutional approach used elsewhere in the same title. 20 U.S.C. § 1684, dealing with impaired vision, states that:

> No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a *recipient* of Federal financial assistance for any education program or activity. (emphasis added).

The precise selection of the terms "programs" and "recipient" throughout the various sections of Title IX evidence the clear intent of Congress that Sections 1681 and 1682 and the regulations thereunder apply only to specific programs or activities which receive direct financial assistance.

A review of the legislative background of Title IX supports this conclusion. The original Senate version of Title IX was institutional in nature. It provided that

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by a public institution which is a recipient of Federal financial assistance for any education program or activity.

117 Cong.Rec. 30156 (1971). This version of Title IX was subsequently rejected and in its stead the present program specific version was enacted. Again, this is clear evidence of the intent of Congress to limit the scope of Title IX.

The courts which have grappled with this issue have ruled consistently with the Congressional interpretation. Most persuasive to this Court in the Fifth Circuit's holding in *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980). In that case the Secretary of Health, Education and Welfare had promulgated regulations which prohibited any school receiving federal financial assistance from engaging in sexual discrimination in employment practices. The regulations were not limited to those employees who were compensated out of federal funds or who worked in programs receiving federal assistance, but they applied to all employees of the entire school system so long as any program or activity of the school received federal financial assistance. The court found the regulations invalid, emphasizing that:

> [w]e cannot find sanction in the statute for this conclusion that any discrimination in an entire school system so taints the system as to permit termination of all federal aid even though federally assisted programs are administered impeccably. The regulations attempt to regulate sex discrimination in employment practices generally rather than in connection with specific programs receiving federal funds. The statute itself indicates that such regulations sweep too broadly.... Further evidence that the regulations must be keyed to a specific program is found in the enforcement provisions.

622 F.2d at 737. *Accord, Seattle University v. Department of Health, Education and Welfare*, 16 F.E.P. 719 (W.D.Wash.1978), *aff'd* 621 F.2d 992 (9th Cir. 1980), *cert. granted sub. nom. United States Department of Health, Education and Welfare v. Seattle University*, 449 U.S. 1009, 101 S.Ct. 563, 66 L.Ed.2d 467 (1981); *Romeo Community Schools v. Department of Health, Education and Welfare*, 438 F.Supp. 1021 (E.D. Mich.1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied* 444 U.S. 972, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir.), *cert. denied* 444 U.S. 972, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979); *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir.), *cert. denied* 444 U.S. 972, 100 S.Ct. 467, 62 L.Ed.2d 387 (1979). The Fifth Circuit's determination that Title IX governs the conduct of a program only if that specific program receives Federal financial assistance is binding on this court.[1] The clear language of Title IX and the intent of Congress require that the Act be applied programmatically. To the extent that the regulations attempt to apply the strictures of Title IX on an institutional basis, the regulations are invalid.

III.

[2] Although I have held that Title IX is applicable only to those specific programs and activities which receive direct federal assistance, Plaintiffs contend that there is a genuine issue of fact as to whether the University's athletic programs receive direct federal aid. Clarence E. Thompson, the Business Manager and Chief Financial Officer of West Texas State University, has submitted an affidavit which asserts that the intercollegiate athletics program maintained by the University does not receive any direct financial assistance of any nature from the federal government. The Plaintiffs argue, however, that various depositions taken in the case reflect that the athletic programs benefit from the fact that students receive veteran's benefits, Basic Educational Opportunity Grants, federal work-study program benefits and other federal financial aid. Plaintiffs also assert that the university receives federal aid for building dormitories and dining halls which particularly benefit athletes. Plaintiffs' contention is, in essence, that the athletic programs of the University are directly benefited by federal financial assistance because those programs receive funds that would otherwise be diverted without the infusion of federal monies.

Plaintiffs' argument that such aid constitutes a direct benefit to the athletics programs is not well-taken. All the types of federal aid enumerated by the Plaintiffs

1. Most of the cases interpreting Title IX have arisen in the context of challenges to regulations under Title IX relating to employment discrimination. I am aware of only one other court that has been directly confronted with the difficult and sensitive task of applying Title IX and its regulations to a school's athletic programs. *Othen v. Ann Arbor School Board*, 507 F.Supp. 1376 (E.D.Mich.1981). Judge Joiner's analytical opinion cogently addresses issues identical to ones raised in the case at bar, and I unreservedly endorse his reasoning and holding.

Of particular import to my holding here is Judge Joiner's analysis of the relationship between Title IX and Title VI of the Civil Rights Act of 1964. While recognizing that the Supreme Court has held in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), that Title IX is to be construed in accordance with Title VI, Judge Joiner relied heavily on *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969), in holding that Title IX is programmatic in nature. *Finch*, which held that Title VI is programmatic in nature, is of course binding authority on this Court.

are general and nonspecific, and such aid is indirect by nature. The type of assistance relied on by Plaintiffs results in some benefit, however remote and indirect, to every program at West Texas State University. Were the Court to adopt Plaintiffs' argument, the programmatic construction of Title IX would be rendered nugatory, because every program or activity at the university would be subject to Title IX. The Act itself compels a different conclusion. In order for the strictures of Title IX to be triggered, the federal financial assistance must be direct. *Othen v. Ann Arbor School Board*, 507 F.Supp. 1376 (E.D.Mich.1981); *Stewart v. New York University*, 430 F.Supp. 1305 (S.D.N.Y.1976). The type of indirect aid received by the University athletic programs does not bring them within the ambit of Title IX.

IV.

Therefore, in accordance with the foregoing opinion, it is

ORDERED that Defendants motion for summary judgment be and hereby is in all things GRANTED.

Clovis Carl GREEN, Jr., Plaintiff,

v.

Carl WHITE, etc., Defendant.

No. 78-1144C(2).

United States District Court,
E. D. Missouri, E. D.

Aug. 10, 1981.

Action was brought against superintendent at state training center for men on ground that he had violated rights of individual plaintiff, and all members of specific church, to exercise their religious beliefs. The United States District Court for the Eastern District of Missouri, John F. Nangle, J., dismissed complaint as frivolous, and appeal was taken. The Court of Appeals, 605 F.2d 376, affirmed in part, reversed in part and remanded. Upon remand, the District Court found that complaint was malicious and dismissed it, and appeal was again taken. The Court of Appeals, 628 F.2d 1126, reversed and remanded with directions. On remand, the District Court, Nangle, J., held that where prison officials believed that prisoner's religion was sham and bogus religion concocted by prisoner for sole purpose of extracting from prison officials privileges not available to general prison population, former prisoner failed to prove that prison officials did not act in good faith in connection with prisoner's religion and action would be dismissed due to frivolous and malicious nature of litigation.

Dismissed.

1. Civil Rights ⇐13.8(1)

Prisoner may recover damages against prison officials entitled to qualified immunity only if he or she can show that officials acted in bad faith or that prison officials took action that they knew or should have known violated prisoner's constitutional rights. 42 U.S.C.A. § 1983.

2. Prisons ⇐4(14)

There is no constitutional right for prisoner to devise a religion in order to obtain concessions from prison officials.

3. Civil Rights ⇐13.4(6)

Where prison officials believed that prisoner's religion was sham and bogus religion concocted by prisoner for sole purpose of extracting from prison officials privileges not available to general prison population, former prisoner failed to prove prison officials did not act in good faith in connection with prisoner's religion and, thus, prisoner could not recover damages from prison officials. 42 U.S.C.A. § 1983.

4. Federal Civil Procedure ⇐1788.10

Where prisoner claiming interference with his religion was unable to offer any

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 81-1398

D. C. Docket No. CA-2-80-73

TINA BENNETT, ET AL.,

Plaintiffs-Appellants,

versus

WEST TEXAS STATE UNIVERSITY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before GARZA, TATE and WILLIAMS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

January 31, 1983

ISSUED AS MANDATE:

MAR 28 1983

OP-JDT-9
Rev. 6/82

APPENDIX D

U.S. COURT OF APPEALS
FILED
FEB 23 1983
GILBERT F. GANUCHEAU
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 81-1398

TINA BENNETT, et al.,

Plaintiffs-Appellants

versus

WEST TEXAS STATE UNIVERSITY, et al.,

Defendants-Appellees

Appeal from the United States District Court
For the Northern District of Texas

(FEBRUARY 23, 1983)

ON PETITION FOR REHEARING

Before GARZA, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

In our prior unpublished opinion in this action, we reversed the grant of summary judgment and ordered the district court to permit plaintiffs to make a record of the direct funding that comes

to the athletics department from the sources previously identified by plaintiffs. We also ruled that "[i]n addition, they should be permitted to demonstrate the sex discrimination which allegedly exists in the intercollegiate athletics program." On rehearing, we withdraw that sentence from the opinion. In all other respects, the rehearing is denied.

DENIED.

A true copy
Test: GILBERT F. GANUCHEAU
Clerk U S Court of Appeals, Fifth Circuit
By [signature] Deputy
New Orleans, Louisiana MAR 28 1983

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

CHAPTER 38—DISCRIMINATION BASED ON SEX OR BLINDNESS

Sec.

1681. Sex.
(a) Prohibition against discrimination; exceptions.
(1) Classes of educational institutions subject to prohibition.
(2) Educational institutions commencing planned change in admissions.
(3) Educational institutions of religious organizations with contrary religious tenets.
(4) Educational institutions training individuals for military services or merchant marine.
(5) Public educational institutions with traditional and continuing admissions policy.
(6) Social fraternities or sororities; voluntary youth service organizations.
(7) Boy or Girl conferences.
(8) Father-son or mother-daughter activities at educational institutions.
(9) Institution of higher education scholarship awards in "beauty" pageants.
(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.
(c) Educational institution defined.
1682. Federal administrative enforcement; report to congressional committees.
1683. Judicial review.
1684. Blindness or visual impairment; prohibition against discrimination.
1685. Authority under other laws unaffected.
1686. Interpretation with respect to living facilities.

§ 1681. Sex

Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

Classes of educational institutions subject to prohibition

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education,

professional education, and graduate higher education, and to public institutions of undergraduate higher education;

Educational institutions commencing planned change in admissions

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

Educational institutions of religious organizations with contrary religious tenets

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

Educational institutions training individuals for military services or merchant marine

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

Public educational institutions with traditional and continuing admissions policy

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

Social fraternities or sororities; voluntary youth service organizations

(6) this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts,

Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

Boy or Girl conferences

(7) this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

Father-son or mother-daughter activities at educational institutions

(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

Institution of higher education scholarship awards in "beauty" pageants

(9) this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any

community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

Educational institution defined

(c) For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

Pub.L. 92-318, Title IX, § 901, June 23, 1972, 86 Stat. 373; Pub.L. 93-568, § 3(a), Dec. 31, 1974, 88 Stat. 1862; Pub.L. 94-482, Title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234.

Historical Note

References in Text. This chapter, referred to in subsecs. (b) and (c), was in the original "this title", meaning Title IX of Pub.L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c-6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of Title IX to the Code, see Tables volume.

1976 Amendment. Subsec. (a). Pub.L. 94-482 in par. (6) substituted "this" for "This", and added pars. (7) to (9).

1974 Amendment. Subsec. (a). Pub.L. 93-568 added par. (6).

Effective Date of 1976 Amendment. Pub.L. 94-482, § 412(b), provided that: "The amendment made by subsection (a) [to this section] shall take effect upon the date of enactment of this Act [Oct. 12, 1976]."

Effective Date of 1974 Amendment. Pub.L. 93-568, § 3(b), provided that: "The provisions of the amendment made by subsection (a) [amending this section] shall be effective on, and retroactive to, July 1, 1972."

Regulations; Nature of Particular Sports; Intercollegiate Athletic Activities. Pub.L. 93-380, Title VIII, § 844, Aug. 21, 1974, 88 Stat. 612, provided that the Secretary prepare and publish, not more than 30 days after Aug. 21, 1974, proposed regulations implementing the provisions of this chapter regarding prohibition of sex discrimination in federally assisted programs, including reasonable regulations for intercollegiate athletic activities considering the nature of the particular sports.

Legislative History. For legislative history and purpose of Pub.L. 92-318, see 1972 U.S.Code Cong. and Adm.News, p. 2462. See, also, Pub.L. 93-568, 1974 U.S. Code Cong. and Adm.News, p. 6779; Pub.L. 94-482, 1976 U.S.Code Cong. and Adm.News, p. 4713.

Library References

Drugs and Narcotics ⇐9. C.J.S. Drugs and Narcotics §§ 20, 21.

Code of Federal Regulations

Application,
- Improvement of post secondary education, see 45 CFR 1501.2.
- National Institute of Education programs, see 45 CFR 1400.2.
- Veterans' cost-of-instruction payments to institutions of higher education, see 45 CFR 189.4.

Policies and procedures, see 45 CFR 86.1 et seq.

Notes of Decisions

Activities not within section 3
Activities within section 2
Exhaustion of administrative remedies 5
Private right of action 4
Purpose 1

---

1. Purpose

Under this section, congressional intent was to eradicate sex discrimination in nonreligious, nonmilitary, coeducational programs, including, but not limited to, sex discrimination in employment in educational activities. Piascik v. Cleveland Museum of Art, D.C.Ohio 1977, 426 F. Supp. 779.

2. Activities within section

Had advanced or college preparatory courses been offered in each high school, rather than in a separate high school, and had school authorities required higher academic standing of girls for admission to such course, such standards would have been illegal discrimination on the basis of sex. Berkelman v. San Francisco Unified School Dist., C.A.Cal. 1974, 501 F.2d 1264.

Discrimination in high school interscholastic athletics constitutes discrimination in education within purview of this section. Brenden v. Independent School Dist. 742, C.A.Minn.1973, 477 F.2d 1292.

Operation of art museum, which received federal assistance for education program it operated for school system and which operated library, slide, and teaching facilities for 80 to 90 university students, qualified as an educational activity receiving Federal financial assistance within meaning of this section. Piascik v. Cleveland Museum of Art, D.C.Ohio 1976, 426 F.Supp. 779.

3. Activities not within section

Fact that high school grooming code prohibited only male students from wearing hair below the ear lobe or over the collar did not constitute sex-based discrimination within meaning of this section. Trent v. Perritt, D.C.Miss.1975, 391 F.Supp. 171.

4. Private right of action

There exists an implied private right of action for vindicating violations of this section. Piascik v. Cleveland Museum of Art, D.C.Ohio 1976, 426 F.Supp. 779.

For most situations, this chapter is not to be interpreted as a grant of a private right of action. Cape v. Tennessee Secondary School Athletic Ass'n, D.C.Tenn. 1976, 424 F.Supp. 732.

Even if unavailability of administrative remedies would entitle plaintiff student to bring private action against university to enforce provisions of this section, plaintiff's action seeking review of university's decision denying plaintiff admission to medical school, which also sought money damages, was beyond scope of its provisions and district court could not permit such expansion of statutory coverage. Cannon v. University of Chicago, D.C.Ill.1976, 406 F.Supp. 1257, affirmed 559 F.2d 1063.

This chapter did not authorize private right of action by student against university based upon its refusal to admit her to its school of medicine on alleged basis of her age, sex and lack of advanced degree. Id.

5. Exhaustion of administrative remedies

Female high school student who sought to challenge on equal protection grounds promulgation and enforcement by public school officials of special rules for girls' basketball was not entitled to relief under this chapter where plaintiff student had not pursued administrative remedies within the Department of Health, Education, and Welfare. Cape v. Tennessee Secondary School Athletic Ass'n, D.C. Tenn.1976, 424 F.Supp. 732.

§ 1682. Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the

provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Pub.L. 92-318, Title IX, § 902, June 23, 1972, 86 Stat. 374.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 92-318, see 1972 U.S.Code Cong. and Adm.News, p. 2462.

§ 1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action

shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title.

Pub.L. 92-318, Title IX, § 903, June 23, 1972, 86 Stat. 374.

Historical Note

Codification. "Section 1682 of this title", where first appearing, was substituted for "section 1002" as conforming to intent of Congress as Pub.L. 92-318 was enacted without any section 1002 and subsequent text refers to "section 902", codified as "section 1682 of this title".

Legislative History. For legislative history and purpose of Pub.L. 92-318, see 1972 U.S.Code Cong. and Adm.News, p. 2462.

West's Federal Forms

Enforcement and review of decisions and orders of administrative agencies, see § 851 et seq.

§ 1684. Blindness or visual impairment; prohibition against discrimination

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

Pub.L. 92-318, Title IX, § 904, June 23, 1972, 86 Stat. 375.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 92-318, see 1972 U.S.Code Cong. and Adm.News, p. 2462.

§ 1685. Authority under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

Pub.L. 92-318, Title IX, § 905, June 23, 1972, 86 Stat. 375.

Historical Note

References in Text. This chapter, referred to in text, was in the original "this title", meaning Title IX of Pub.L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c-6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of Title IX to the Code, see Tables volume.

Legislative History. For legislative history and purpose of Pub.L. 92-318, see 1972 U.S.Code Cong. and Adm.News, p. 2462.

§ 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

Pub.L. 92-318, Title IX, § 907, June 23, 1972, 86 Stat. 375.

Historical Note

References in Text. This chapter, referred to in text, was in the original "this title", meaning Title IX of Pub.L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c-6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of Title IX to the Code, see Tables volume.

This Act, referred to in text, is Pub.L. 92-318, June 23, 1972, 86 Stat. 235, known as the Education Amendments of 1972. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables volume.

Legislative History. For legislative history and purpose of Pub.L. 92-318, see 1972 U.S.Code Cong. and Adm.News, p. 2462.

82-1688

Office-Supreme Court, U.S.
FILED
APR 6 1983
ALEXANDER L. STEVAS,

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEST TEXAS STATE UNIVERSITY, *et al.*,
Petitioners,

v.

TINA BENNETT, *et al.*,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALAN B. JONES
Counsel of Record

HARLOW SPROUSE
UNDERWOOD, WILSON, BERRY,
STEIN & JOHNSON
P. O. Box 9158
Amarillo, Texas 79105
(806) 376-5613

Attorneys for Petitioners

TABLE OF CONTENTS

APPENDIX A ..... *Opinion of the Court of Appeals*

APPENDIX B ..... *Opinion of the District Court*

APPENDIX C ..... *Judgment of the Court of Appeals*

APPENDIX D ..... *Order of the Court of Appeals on Petition for Rehearing*

APPENDIX E ..... *Text of Title IX*

APPENDIX A

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 81-1398

TINA BENNETT, *et al.*,
Plaintiffs-Appellants

versus

WEST TEXAS STATE UNIVERSITY, *et al.*,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

January 31, 1983

Before GARZA, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

This appeal challenges a summary judgment of dismissal in a class action charging sex discrimination in the intercollegiate athletics program at West Texas State University. Plaintiffs alleged in their complaint that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.,[1] was violated by the various policies and practices

[1] Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681. After this general prohibition come nine exceptions to coverage, none of which are relevant to the instant case.

which discriminate against women by denying them equal opportunity in the university intercollegiate athletics program.

It is undisputed that West Texas State University receives a great deal of federal money. The dispute in this case centers around the exact type of federal financial assistance which triggers the provisions of Title IX. There are two theories on this issue, as the district court recognized in its opinion.

> The Defendants have argued that the exact language of Title IX itself is controlling and, thus, that only if an athletic program or activity directly receives federal financial assistance must there be no discrimination. This is what has been referred to as the "programmatic approach." Plaintiffs assert, to the contrary, that what is prohibited is "institutional" discrimination, i.e., that if an institution receives federal funds, then there may not be any discrimination in any of its programs or activities, regardless of whether that program or activity itself receives the federal aid. This is the approach taken by the regulations.

Record on Appeal, vol. 2, at 343-44.

The court below ruled adversely to plaintiffs, holding first that the institutional approach was invalid and second, that the plaintiffs had not demonstrated receipt of the "direct" funds necessary to trigger Title IX under the programmatic approach. Without anticipating the decision of the Fifth Circuit on these issues, we simply hold today that the plaintiffs must be permitted to present a case on the receipt of direct funds by the athletics department. Plaintiffs contend that the athletics program does indeed receive direct funds including work-study employment assistance to students who are employed in the athletics department,

compulsory student fees which support the athletics program and subsidized housing for athletes. At this point in the development of the case, plaintiffs have not been allowed to make a record of the direct funding that comes to the athletics department from the sources they identified. They must be permitted to do so. In addition, they should be permitted to demonstrate the sex discrimination which allegedly exists in the intercollegiate athletics program.

For the foregoing reasons, we reverse and remand for further consideration consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

Civ. A No. CA 2-80-0073

TINA BENNETT, *et al.*,

Plaintiffs

versus

WEST TEXAS STATE UNIVERSITY, *et al.*,

Defendants

MEMORANDUM ORDER GRANTING SUMMARY JUDGMENT

July 27, 1981

ROBERT W. PORTER, District Judge.

The named Plaintiffs in this action are six female students at West Texas State University in Canyon, Texas, who participate in the University's intercollegiate athletics program. The Defendants are the University as well as various individuals who are responsible for the administration of the University's affairs, including but not limited to the intercollegiate athletics program.

The Plaintiffs, on behalf of themselves and as representatives of the class that has heretofore been certified, have

alleged that the Defendants maintain various policies and practices which discriminate against women on the basis of sex and which deny women equal opportunity in the University's intercollegiate athletics program. The Plaintiffs contend that such policies and practices have had the effect of excluding Plaintiffs from full participation in, denying Plaintiffs the benefits of, and subjecting Plaintiffs to discrimination in an athletic program or activity receiving federal financial assistance, and thus that such policies and practices are in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (hereinafter Title IX) and the regulations promulgated thereunder, 34 C.F.R. § 106.1 *et seq.* (originally codified at 45 C.F.R. § 86.1 *et seq.*).

It is the Defendants' position that the intercollegiate athletics program does not receive federal financial assistance, and therefore that the program is outside the scope of Title IX. The Defendants also contend that, to the extent the referenced regulations purport to apply to the University's intercollegiate athletic program irrespective of the absence of direct federal financial assistance to that specific program, those regulations are beyond the statutory authority granted under Title IX and are invalid.

The Defendants have filed a motion for summary judgment, to which the Plaintiffs have duly responded. After hearing and careful consideration of the briefs and arguments of counsel, I am of the opinion, for the reasons set out below, that the Defendants are entitled to summary judgment as a matter of law.

I.

The portion of Title IX at issue here is Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681, which provides in pertinent part, that

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance....

The regulations, 34 C.F.R. § 106.1, which have been promulgated by the Department of Education pursuant to Title IX, provide as follows:

> (a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any intercollegiate, club, or intramural athletics offered by a *recipient*, and no recipient shall provide any such athletics separately on such basis. (emphasis added).

The resolution of Defendants' motion for summary judgment is dependent upon the meaning and effect of these two provisions and their relationship to one another. The Defendants have argued that the exact language of Title IX itself is controlling and, thus, that only if an atheltic program or activity directly receives federal financial assistance must there be no discrimination. This is what has been referred to as the "programmatic approach." Plaintiffs assert, to the contrary, that what is prohibited is "institutional" discrimination, i.e., that if an institution receives federal funds, then there may not be any discrimination in any of its programs or activities, regardless of whether that program or activity itself receives the federal aid. This is the approach taken by the regulations.

II

An examination of the various sections of Title IX indicates that the drafters of this legislation were very aware of the distinction between the programmatic and institutional approaches. For example, 20 U.S.C. § 1682, the provision by which the agency and the courts are to determine the permissible scope of any regulations instituted to effectuate Title IX, limits the agency's authority to promulgate rules and regulations to include only those programs or activities receiving federal financial assistance:

> Each federal department . . . which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title *with respect to such program or activity* by issuing rules, regulations, or orders. (emphasis added).

Section 1682 also contains an enforcement provision which provides for termination of federal financial assistance, which is limited to particular programs or activities which receive federal funds. These provisions obviously embody a programmatic approach and should be contrasted with the institutional approach used elsewhere in the same title. 20 U.S.C. § 1684, dealing with impaired vision states that:

> No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a *recipient* of Federal financial assistance for any education program or activity. (emphasis added).

The precise selection of the terms "programs" and "recipient" throughout the various sections of Title IX evidence the clear intent of Congress that Sections 1681 and

1682 and the regulations thereunder apply only to specific programs or activities which receive direct financial assistance.

A review of the legislative background of Title IX supports this conclusion. The original Senate version of Title IX was institutional in nature. It provided that

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by a public institution which is a reciepient of Federal financial assistance for any education program or activity.

117 Cong.Rec. 30156 (1971). This version of Title IX was subsequently rejected and in its stead the present program specific version was enacted. Again, this is clear evidence of the intent of Congress to limit the scope of Title IX.

The courts which have grappled with this issue have ruled consistently with the Congressional interpretation. Most persuasive to this Court in the Fifth Circuit's holding in *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980). In that case the Secretary of Health, Education and Welfare had promulgated regulations which prohibited any school receiving federal financial assistance from engaging in sexual discrimination in employment practices. The regulations were not limited to those employees who were compensated out of federal funds or who worked in programs receiving federal assistance, but they applied to all employees of the entire school system so long as any program or activity of the school received federal financial assistance. The court found the regulations invalid, emphasizing that:

> [w]e cannot find sanction in the statute for this conclusion that any discrimination in an entire school system

> so taints the system as to permit termination of all federal aid even though federally assisted programs are administered impeccably. The regulations attempt to regulate sex discrimination in employment practices generally rather than in connection with specific programs receiving federal funds. The statute itself indicates that such regulations sweep too broadly. . . . Further evidence that the regulations must be keyed to a specific program is found in the enforcement provisions.

622 F.2d at 737. *Accord, Seattle University v. Department of Health, Education and Welfare,* 16 F.E.P. 719 (W.D. Wash. 1978), *aff'd* 621 F.2d 992 (9th Cir. 1980), *cert. granted sub. nom. United States Department of Health, Education and Welfare v. Seattle University,* 449 U.S. 1009, 101 S.Ct. 563, 66 L.Ed.2d 467 (1981); *Romeo Community Schools v. Department of Health, Education and Welfare,* 438 F.Supp. 1021 (E.D. Mich. 1977), *aff'd,* 600 F.2d 581 (6th Cir.), *cert. denied* 444 U.S. 972, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979); *Junior College District of St. Louis v. Califano,* 597 F.2d 119 (8th Cir.), *cert. denied* 444 U.S. 972, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979); *Islesboro School Committee v. Califano,* 593 F.2d 424 (1st Cir.), *cert. denied* 444 U.S. 972, 100 S.Ct. 467, 62 L.Ed.2d 387 (1979). The Fifth Circuit's determination that Title IX governs the conduct of a program only if that specific program receives Federal financial assistance is binding on this court.[1] The clear language

---

[1]Most of the cases interpreting Title IX have arisen in the context of challenges to regulations under Title IX relating to employment discrimination. I am aware of only one other court that has been directly confronted with the difficult and sensitive task of applying Title IX and its regulations to a school's athletic programs. *Othen v. Ann Arbor School Board,* 507 F.Supp. 1376 (E.D. Mich. 1981). Judge Joiner's analytical opinion cogently

of Title IX and the intent of Congress require that the Act be applied programmatically. To the extent that the regulations attempt to apply the strictures of Title IX on an institutional basis, the regulations are invalid.

III.

Although I have held that Title IX is applicable only to those specific programs and activities which receive direct federal assistance, Plaintiffs contend that there is a genuine issue of fact as to whether the University's athletic programs receive direct federal aid. Clarence E. Thompson, the Business Manager and Chief Financial Officer of West Texas State University, has submitted an affidavit which asserts that the intercollegiate athletics program maintained by the University does not receive any direct financial assistance of any nature from the federal government. The Plaintiffs argue, however, that various depositions taken in the case reflect that the athletic programs benefit from the fact that students receive veteran's benefits, Basic Educational Opportunity Grants, federal work-study program benefits and other federal financial aid. Plaintiffs also assert that the university receives federal aid for building dormitories and dining halls which parti-

---

addresses issues identical to ones raised in the case at bar, and I unreservedly endorse his reasoning and holding.

Of particular import to my holding here is Judge Joiner's analysis of the relationship between Title IX and Title VI of the Civil Rights Act of 1964. While recognizing that the Supreme Court has held in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), that Title IX is to be construed in accordance with Title VI, Judge Joiner relied heavily on *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969), in holding that Title IX is programmatic in nature. *Finch*, which held that Title VI is programmatic in nature, is of course binding authority on this Court.

cularly benefit athletes. Plaintiffs' contention is, in essence, that the athletic programs of the University are directly benefited by federal financial assistance because those programs receive funds that would otherwise be diverted without the infusion of federal monies.

Plaintiffs' argument that such aid constitutes a direct benefit to the atheletics programs is not well-taken. All the types of federal aid enumerated by the Plaintiffs are general and nonspecific, and such aid is indirect by nature. The type of assistance relied on by Plaintiffs results in some benefit, however remote and indirect, to every program at West Texas State University. Were the Court to adopt Plaintiffs' argument, the programmatic construction of Title IX would be rendered nugatory, because every program or activity at the university would be subject to Title IX. The Act itself compels a different conclusion. In order for the strictures of Title IX to be triggered, the federal financial assistance must be direct. *Othen v. Ann Arbor School Board,* 507 F.Supp. 1376 (E.D.Mich.1981); *Stewart v. New York University,* 430 F.Supp. 1305 (S.D.N.Y.1976). The type of indirect aid received by the University athletic programs does not bring them within the ambit of Title IX.

IV.

Therefore, in accordance with the foregoing opinion, it is

ORDERED that Defendants motion for summary judgment be and hereby is in all things GRANTED.

APPENDIX C

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 81-1398

D. C. Docket No. CA-2-80-73

TINA BENNETT, *et al.*,

Plaintiffs-Appellants,

versus

WEST TEXAS STATE UNIVERSITY, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before GARZA, TATE and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

January 31, 1983

ISSUED AS MANDATE:

APPENDIX D

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 81-1398

TINA BENNETT, *et al.*,

Plaintiffs-Appellants

versus

WEST TEXAS STATE UNIVERSITY, *et al.*,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

February 23, 1983

ON PETITION FOR REHEARING

Before GARZA, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

In our prior unpublished opinion in this action, we reversed the grant of summary judgment and ordered the district court to permit plaintiffs to make a record of the direct funding that comes to the athletics department from the sources previously identified by plaintiffs. We also ruled that "[i]n addition, they should be permitted to demonstrate the sex discrimination which allegedly exists in the intercollegiate athletics program." On rehearing, we withdraw that sentence from the opinion. In all other respects, the rehearing is denied.

DENIED.

APPENDIX E

TITLE IX, EDUCATION AMENDMENTS OF 1972, Pub. L. No. 92-318, 86 Stat. 373, 20 U.S.C. § 1681, *et seq.*, as amended

SEX DISCRIMINATION PROHIBITED

Sec. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) this section shall not apply to membership practices —

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) this section shall not apply to —

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation

conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for —

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons

of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

FEDERAL ADMINISTRATIVE ENFORCEMENT

Sec. 902. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal

shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

JUDICIAL REVIEW

Sec. 903. Any department or agency action taken pursuant to section 1002 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

PROHIBITION AGAINST DISCRIMINATION AGAINST THE BLIND

Sec. 904. No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

EFFECT ON OTHER LAWS

Sec. 905. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

AMENDMENTS TO OTHER LAWS

Sec. 906. (a) Sections 401(b), 407(a) (2), 410, and 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b), 2000c-6(a) (2), 2000c-9, and 2000h-2) are each amended by inserting the word "sex" after the word "religion".

(b) (1) Section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)) is amended by inserting after the words "the provisions of section 6" the following: "(except section 6(d) in the case of paragraph (1) of this subsection)".

(2) Paragraph (1) of subsection 3(r) of such Act (29 U.S.C. 203 (r) (1)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

(3) Section 3(s) (4) of such Act (29 U.S.C. 203(s) (4)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

INTERPRETATION WITH RESPECT TO LIVING FACILITIES

Sec. 907. Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

CERTIFICATE OF SERVICE

This is to certify that, on the 13 day of April, 1983, three copies of the foregoing Supplemental Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Respondents by placing the same in the United States mails, certified mail, postage prepaid, addressed to their attorneys of record as follows:

Ms. Margaret Kohn
Ms. Marcia D. Greenberger
Ms. Nancy Duff Campbell
National Women's Law Center
1751 N Street, N.W.
Washington, D.C. 20036

Ms. Betty Wheeler
Hoffman & Wheeler
1008 S. Madison
Amarillo, TX 79101

Alan B. Jones

Office-Supreme Court, U.S.
FILED
MAY 27 1983
ALEXANDER L. STEVAS,
CLERK

82-1683

No. 82-1683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WEST TEXAS STATE UNIVERSITY, *et al.*,
Petitioners,

v.

TINA BENNETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

NANCY DUFF CAMPBELL
Counsel of Record

MARGARET A. KOHN
MARCIA D. GREENBERGER
NATIONAL WOMEN'S LAW CENTER
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

BETTY WHEELER
HOFFMAN & WHEELER
1008 South Madison
Amarillo, Texas 79101
(806) 376-8903

Attorneys for Respondents

Dated: May 27, 1983

TABLE OF CONTENTS

Page

Table of Authorities.....ii

Question Presented.....1

Statement of the Case.....2

Reasons for Not Granting the Writ.....8

I. The Decision of the Court of Appeals Does Not Present An Important Question of Federal Law, Create a Conflict in the Circuits, or Represent a Departure from the Accepted and Usual Course of Judicial Proceedings Sufficient to Warrant Review by This Court.....8

II. The Petition for a Writ of Certiorari Should be Promptly Denied.....16

Conclusion.....20

Certificate of Service.....21

Table of Authorities

Cases — Page

Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983).....2, 16-19

Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967).....9

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916).....9

Statutes and Rules

Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1686.....passim

Section 1681(a).....10-11

United States Court of Appeals for the Fifth Circuit Rule 25.....13

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1982

No. 82-1683

WEST TEXAS STATE UNIVERSITY, et al.,

Petitioners,

v.

TINA BENNETT, et al.,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

Brief for Respondents in Opposition

QUESTION PRESENTED

Whether the Court of Appeals erred in reversing the District Court's grant of summary judgment and remanding the case to permit plaintiffs to develop the

record, so that the applicability of Title IX of the Education Amendments of 1972 to West Texas State University's intercollegiate athletic program could be determined with a more complete factual record?

STATEMENT OF THE CASE

Contrary to Petitioners' Statement of the Case, the issues presented by this case in its current posture are not similar to those presented to the Court in Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), cert. granted, 51 U.S.L.W. 3611 (Feb. 22, 1983). Grove City involves the construction of Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1686 [hereinafter Title IX]. This case involves whether the Court of Appeals erred in reversing the District Court's grant of summary

judgment and remanding the case to permit plaintiffs to develop the record so that the applicability of Title IX could be considered in the context of a more complete factual record.

Plaintiff-respondents are six women students [hereinafter "the students" or "plaintiffs"] enrolled at West Texas State University [hereinafter "WTSU" or "the University"] who participate in the University's intercollegiate athletic program. On April 15, 1980, they filed a class action complaint against WTSU and several of its officials, alleging sex discrimination in the University's athletic program in violation of Title IX, which prohibits sex discrimination in educational programs or activities

receiving federal financial assistance.1/

After the case was certified as a class action and while the students were engaged in discovery, the University filed a Motion for Summary Judgment with a supporting affidavit. It argued that WTSU's athletic program does not "directly" receive federal financial assistance, and therefore is not a "program or activity receiving [f]ederal

---

1/ Plaintiffs alleged sex discrimination against women in the policies and practices of the University's intercollegiate athletic program with respect to athletic scholarships, travel allowance allocations and expenditures, scheduling of games and practice times, compensation and treatment of coaches, the provision of locker rooms, practice and office facilities, supplies, equipment, and laundry facilities, the authority to spend in excess of budget allocations, and the provision of publicity, promotion and awards. Second Amended Complaint ¶19.

financial assistance" within the meaning of Title IX. The University also argued that to the extent that the Title IX regulations purport to apply Title IX to the athletic program, they are in excess of the statutory mandate.

Before responding, the students pursued an abbreviated continuation of their discovery,2/ in order to focus on the nature of federal funding at the University. In opposition to the Motion for Summary Judgment, the students argued that Title IX was intended to cover programs or activities receiving federal financial assistance regardless of the manner in which that assistance is received, and that the assistance

---

2/ In addition to interrogatories, the students took the depositions of two university officials.

received by WTSU is, under any reading of Title IX's scope, sufficient to subject its intercollegiate athletic program to Title IX's requirements.

The District Court granted the University's Motion for Summary Judgment on July 27, 1981. In a six-page memorandum opinion, the Court held that Title IX applies only to an educational program or activity that receives "direct" federal financial assistance, and that the Department of Education regulations, to the extent that they are inconsistent with this holding, are invalid. Further, the types of federal funding received by the athletic programs at WTSU, the Court determined, are general, non-specific and "indirect," and therefore not sufficient to trigger Title IX's prohibition on sex discrimination.

On appeal, the United States Court of Appeals for the Fifth Circuit, in a three-page unpublished opinion, expressly declined to decide whether the federal funding received by WTSU is sufficient to subject its athletic program to Title IX because "[a]t this point in the development of the case, plaintiffs have not been allowed to make a record of the direct funding that comes to the athletics department from the sources they identified." Slip op. at 3. Therefore the grant of summary judgment was reversed, and the case remanded to permit the students to make such a record.3/

3/ Initially, the Court of Appeals also stated that the students "should be permitted to demonstrate the sex discrimination which allegedly exists in the intercollegiate athletics program," but, in response to the University's (con't)

REASONS FOR NOT GRANTING THE WRIT

I. The Decision of the Court of Appeals Does Not Present An Important Question of Federal Law, Create a Conflict in the Circuits, or Represent a Departure from the Accepted and Usual Course of Judicial Proceedings Sufficient to Warrant Review by this Court

The University's contention that the Court of Appeals decided an important question of federal law which should be decided by this Court rests on an erroneous construction of the Court of Appeals' opinion. A proper construction of that opinion makes clear that this case in its current posture presents no question of federal law warranting review by this Court.

---

petition for rehearing, the Court deleted this statement from its opinion.

The Court of Appeals simply reversed the District Court's grant of summary judgment and remanded the case for a further development of the factual record. This Court has consistently declined, absent some special justification, to grant review of a decision of a court of appeals remanding a case to a district court for further proceedings. See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not ripe for review by the Court"); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 257-58 (1916). The usual presumption against review in this Court of such decisions is especially applicable in this case.

This case as it was presented to the Court of Appeals involved two issues: (1) whether Title IX of the Education Amendments of 1972 reaches sex discrimination in an intercollegiate athletic program that receives federal financial assistance, regardless of the manner in which that assistance is received, and (2) whether, even if "direct" receipt of federal financial assistance is required, the federal funding actually received by WTSU's intercollegiate athletic program is sufficient to bring that program within Title IX.

Both of these issues involve an interpretation of the scope of Title IX's prohibition on sex discrimination in "programs or activities receiving [f]ederal financial assistance," 20

U.S.C. §1681(a). Moreover, both issues involve the application of that interpretation to the facts of this case -- that is, to the kinds of federal funding received by WTSU and its athletic program, and the way in which that funding is used by both the University and its athletic program. The Court of Appeals expressly declined to resolve either of these issues. Although its opinion does not spell out its reasoning in detail, the Court stated that "without anticipating the decision of the Fifth Circuit on these issues, we simply hold today that the plaintiffs must be permitted to present a case on the receipt of direct funds by the athletics department." Slip. op. at 3.

Recognizing the interrelationship between the legal and factual issues, the Court was unwilling to resolve the legal issues presented without further development of the factual record. In particular, it noted that the students contended that the athletic program "does indeed receive direct funds including work-study employment assistance to students who are employed in the athletics department, compulsory student fees which support the athletics program and subsidized housing for athletes." Id. The Court concluded, however, that "[a]t this point in the development of the case plaintiffs have not been allowed to make a record of the direct funding that comes to the athletics department from the sources they identified. They must be permitted

to do so." Id. Therefore, the Court remanded the case to the District Court.

The University's assertion that in this three-page, unpublished opinion4/

4/ The mere fact that the Court of Appeals addressed the issues before it in a short, summary opinion and ordered that its opinion not be published demonstrates that that Court in no way thought it was deciding a substantial federal question, or creating a conflict in the circuits. Under Rule 25 of the Rules of the United States Court of Appeals for the Fifth Circuit, every opinion "believed to have precedential value" or that "may in any way interest persons other than the parties to a case" is to be published. "Therefore, an opinion will be published if it . . . establishes a new rule of law, alters or modifies an existing rule of law . . . ; creates or resolves a conflict of authority either within the circuit or between this circuit and another; . . . concerns or discusses a factual or legal issue of significant public interest. . . ." Id. Obviously, the Court did not believe its opinion fell within any of these or the other criteria set forth in Rule 25 for determining when opinions will be published.

the Court of Appeals in any fashion addressed the question of the proper interpretation of the scope of Title IX, or the application of that interpretation to this case, is simply without merit. The Court never reached either issue, but remanded the case to the District Court for further development of the record so that these issues could be considered after a fuller factual record has been developed.

Whether the Court of Appeals was correct in remanding the case for further development of the record clearly presents no substantial federal question. For the same reason, the Court's determination creates no conflict in the judicial circuits because by its very nature it is limited

in its application to this case and the development of this factual record. Finally, the Court's decision to remand is not a departure from the accepted and usual course of judicial proceedings to warrant review by this Court in its supervisory role over the lower federal courts, as the University itself acknowledges by not asserting this ground as a reason for granting the writ.[5/]

5/ Indeed, in its petition for rehearing to the Court of Appeals, the University acknowledged that that Court "declined to address [the] issues of statutory construction [resolved by the District Court]. Instead, [the] Court . . . predicated its decision upon a perceived inadequacy in the summary judgment record. . . ." Appellees' Pet. for Rehearing at 2. The University argued that the Court's determination was for this reason incorrect and should be reconsidered. As noted above, the Court declined to grant the petition except to agree to delete the sentence in its opinion that would have permitted (con't)

II. The Petition for a Writ of Certiorari Should Be Promptly Denied

As plaintiffs have demonstrated, the decision of the Court of Appeals affords no basis for granting the petition for a writ of certiorari. Moreover, despite similarities between the underlying federal funding issues in this case, which have not yet been addressed by the Court of Appeals, and the federal funding issues presented in Grove City College v. Bell, plaintiffs respectfully request that this Court not withhold decision on the petition for certiorari in the instant case pending resolution of the Grove City case next term.

---

plaintiffs to develop the record on the merits of their claim of sex discrimination as well as the record of the federal funding that comes to the athletic program.

Because of the present posture of this case, the resolution of the federal funding issues presented in Grove City will not affect the basis for the Court of Appeals' decision in this case. The Court of Appeals, after a review of the facts presented, directed that the factual record be more fully developed before the applicability of any legal interpretation of the statute, including the interpretation at issue in Grove City, be determined. A prompt denial of the petition for a writ of certiorari will enable plaintiffs to proceed to develop the factual record in the District Court more fully, and obtain a ruling on the federal funding issues, based on that record, initially in that Court and thereafter in the Court of Appeals, if necessary.

At any stage in these proceedings, the applicability of this Court's decision in Grove City, if any, can be determined initially by the lower federal courts.6/ If, after the record is augmented, either of the parties is dissatisfied with the Court of Appeals' decision, a petition for a writ of certiorari may be filed in this Court which presents the federal funding

---

6/ For example, Grove City, as the University states, presents the question whether federal student financial aid brings a school within Title IX. The federal funding issue in this case involves, in part, the question whether federal student financial aid brings a school's athletic program within Title IX. However, even if Grove City holds that student financial aid does not subject a school to Title IX, it will not fully resolve the federal funding issues in this case because federal financial assistance other than student financial aid is involved here, and this assistance, plaintiffs assert, also brings WTSU's athletic program under Title IX.

issues on their merits, against a full evidentiary record. In short, postponement of a decision on the petition for a writ of certiorari in this case pending the resolution of the Grove City case will only delay the development of the factual record that the Court of Appeals determined must be completed before any of the federal funding issues that may be affected by this Court's decision in Grove City can be addressed. To delay the development of that record, which must be completed regardless of the outcome of the Grove City case, and before its applicability to this case can be resolved, would be unwarranted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Nancy Duff Campbell
Counsel of Record

Margaret A. Kohn
Marcia D. Greenberger
National Women's Law Center
1751 N Street, N.W.
Washington, D.C. 2036
(202) 872-0670

Betty Wheeler
Hoffman & Wheeler
1088 South Madison
Amarillo, Texas 79101
(806) 376-8903

Attorneys for Respondents

Certificate of Service

I, Margaret A. Kohn, as a member of the Bar of the United States Supreme Court, and counsel to respondents Bennett, et al., certify that three copies of the foregoing Brief for Respondents in Opposition were mailed this 27th day of May, 1983, with first class postage prepaid, to opposing counsel:

Alan B. Jones
Harlow Sprouse
Underwood, Wilson, Berry,
Stein & Johnson
P.O. Box 9158
Amarillo, Texas 79105
Attorneys for Petitioners

Margaret A. Kohn